

IN THE COURT OF COMMON PLEAS  
PIKE COUNTY, OHIO

THE STATE OF OHIO :  
Plaintiff, : Case No. 2018CR000159  
-vs- :  
FREDERICKA CAROL WAGNER : JUDGE RANDY D. DEERING  
Defendant. :

**STATE'S MOTION FOR A GAG ORDER**

Now comes the State of Ohio, by and through the Ohio Attorney General's Office, and respectfully requests that this Court issue a "gag order" prohibiting all parties and attorneys from making statements to the media or public that have a substantial likelihood of material prejudice in this case. A memorandum in support is attached.

Respectfully submitted,

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## MEMORANDUM IN SUPPORT

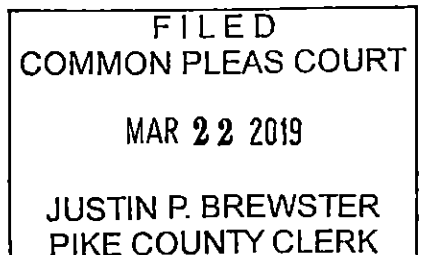
### **I. FACTUAL BACKGROUND**

On July 14, 2018, the Defendant appeared before the Pike County Grand Jury to testify as a witness in the homicide investigation against several members of her family. The portions of her testimony relevant to this case revolved around body armor she purchased for her son, George Wagner III (aka "Billy"). The Defendant testified she purchased all of the body armor after the murders, because she was afraid for Billy's safety. She repeatedly stated that she purchased the items on Amazon, that she had already printed out the records, and that she would provide them to the State. She stated she almost brought the purchase records to grand jury, because she assumed the State would ask about them. She promised to provide all of the purchase records.

On September 11, 2018, Special Prosecutor Canepa met with Defense Counsel Owen at the Bureau of Criminal Investigation ("BCI") and informed him the Defendant had volunteered to provide the State with her Amazon records, and asked if he could provide those.

By September 28, 2018, neither the Defendant nor her counsel had provided the promised records. The State therefore subpoenaed Defendant's Amazon records for May 1, 2016 to present (the State was already in possession of Defendant's Amazon records for January 1, 2014 to April 30, 2016). On November 1, 2018, the State received the subpoenaed records, which showed no evidence of any purchases of the vests.

On November 13, 2018, the Defendant was indicted by a Pike County Grand Jury for Obstructing Justice, in violation of R.C. 2931.32(A) and 2921.32(C)(3) and Perjury, in violation of R.C. 2921.11(A) and 2921.11(F), for lying to the Grand Jury during her testimony on July 14, 2018.

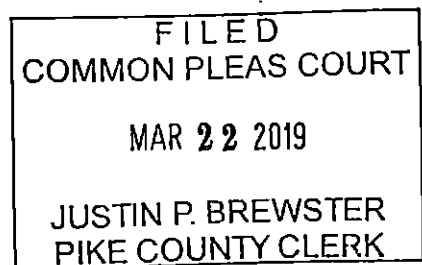


On February 1, 2019, Special Prosecutor Canepa met with Defense Counsel Owen at BCI to look over the bullet proof vests. The first vest had a manufacture date on the exterior, and showed a manufacture date in 2012. The second vest had no clear manufacture date. However, when the vest was opened up, it revealed that the ceramic plates inside the vest had a manufacture date of April 29, 2016. This was previously unknown to the State.

At this February 1, 2019 meeting the State again requested the records of the purchase of the vests that the Defendant had promised. Defense Counsel Owen explained that he and co-counsel had been trying to locate these records, and had been trying various Amazon passwords provided to them by the Defendant, but were thus far unsuccessful. Defendant's Grand Jury testimony was that she already had access to the records and had already printed them out. This directly contradicts the statements of defense counsel that the defense was unable to locate these records during the *seven months* that had elapsed since Defendant testified before the Grand Jury, despite their numerous and thorough attempts to locate them.

On February 3, 2019, Special Prosecutor Canepa emailed Defense Counsel Owen, again requesting the records of the purchase of the vests. Special Prosecutor Canepa reminded Defense Counsel that the State had been seeking those records since Defendant promised them in July of 2018. Defense Counsel Owen responded that he and his co-counsel were still "working hard to get to the bottom of" the purchases of the bullet proof vests.

On March 11, 2019, the State, in response to Defendant's request, sent defense counsel the portions of her Grand Jury transcript relating to her own criminal charges, totaling 8 pages. The State declined to provide the entire transcript of her testimony, which covered issues relating to the pending criminal cases against her family members for the homicides, for which the Defendant was interviewed as a witness.



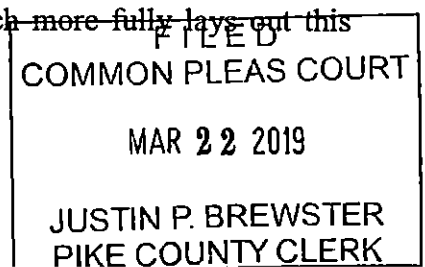
On Thursday, March 14, 2019, Defense Counsel, via email, finally turned over the requested purported records of Defendant's purchase of the bullet proof vests. The records provided on March 14, 2019 revealed the purchases occurred on eBay, rather than Amazon. The State responded immediately to that email, thanking Defense Counsel and informing them that the State would issue subpoenas as soon as possible for the records to confirm the information in the documents that Defense Counsel had sent. The State did issue subpoenas the very next day for records from EBay and PayPal for the Defendant, again for the time period ranging from May 1, 2016, through the present date.<sup>1</sup> The same day that the State issued the subpoenas, March 15, 2019, Defense Counsel informed the State he would be filing a motion to dismiss the indictment, based on the strength of the evidence against the Defendant.<sup>2</sup>

On Friday, March 15, 2019, Defendant filed her *Motion to Dismiss Indictment*. Attached to that motion were several exhibits, the first of which was the 8 pages of Defendant's Grand Jury testimony that had been turned over to defense counsel. Neither the motion nor the attached Grand Jury transcript was filed under seal.

Two days later, on Sunday, March 17, 2019, an article was posted at 5:00am by the Cleveland newspaper the Plain Dealer, containing an interview of Defendant Fredericka Wagner

<sup>1</sup> Because the records were not sent to the State until 3:58 p.m. on March 14, 2019, the State was unable to issue subpoenas on the same date, as the Court closes daily at 4:00 p.m.

<sup>2</sup> A motion to dismiss is clearly an improper vehicle to challenge the strength of the evidence against a criminal defendant. *State v. Daily*, 4th Dist. Athens No. 97CA25, 1998 Ohio App. LEXIS 214, \*3 (Jan. 15, 1998); *State v. Palmer*, 131 Ohio St. 3d 278, 2012-Ohio-580, 964 N.E.2d 406, ¶ 22; *State v. Brown*, 4th Dist. Athens No. 98CA14, 98CA15, 1999 Ohio App. LEXIS 1974, \*15 (April 26, 1999). Motions to dismiss in criminal cases are properly based on procedural issues, e.g. statute of limitations. The State has filed a Memo Contra Defendant's *Motion to Dismiss Indictment*, along with a Motion to Strike, which more fully lays out this argument.



and Defense Counsel James Owen.<sup>3</sup> The article discusses Defendant's *Motion to Dismiss Indictment*, filed on Friday, March 15, 2019. The article even quotes, at length, the Defendant's Grand Jury testimony, which was made public in that motion. The article discusses the records of Defendant's purchase (which were turned over to the State on March 14, 2019, after the State had been requesting them for *eight months*, to the day). The article stated, in relevant part:

Because of that, she and her attorney said, she was charged with obstruction and lying to the grand jury.

But, said her attorneys, Wagner made a simple mistake. She bought both vests, one for \$379.99 and the other for \$284.99, through her PayPal account.

She bought both from eBay. The PayPal receipts show Wagner made the purchases May 7, 2016, which was 15 days after the slayings.

"I made a mistake; I'm nearly 77-years-old," she said of erroneously citing Amazon.

Her Columbus attorneys, James Owen and Charles Koenig, said the error should never have led to charges.

"It's like telling people that you paid for your wife's Christmas present with a MasterCard," Owen said. "But you made a mistake and really used a Visa. It's a distinction without a difference."<sup>4</sup>

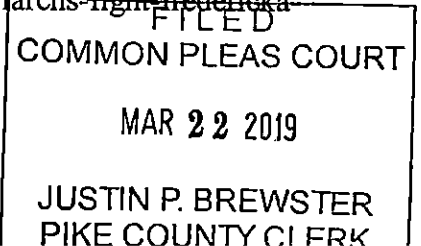
Defense Counsel Owens also brought the records of Defendant's purchase to the interview—he is photographed "go[ing] through receipts documenting her purchase of two bulletproof vests online." (*Id.*)

The Defendant then went on to comment on the cases against her other family members, cases in which the Court has already issued a gag order: "Wagner said she told the

<sup>3</sup> <https://expo.cleveland.com/news/g661-2019/03/4618af0fb93984/a-matriarchs-fight-fredericka-wagner-denies-charges-allegations-in-pike-county-mass-murder.html>.

It is unclear when the interview actually took place, but given that the reporter from the Plain Dealer contacted the Prosecutor at 3:36 p.m. on Friday, March 15, 2019, just 43 minutes after Defense Counsel had emailed a copy of the motion to the Prosecutor, it is likely the interview of the Defendant took place well in advance of that date/time. The Plain Dealer is based in Cleveland, and the interview took place at the Defendant's home in Pike County, approximately 220 miles south of Cleveland.

<sup>4</sup> <https://expo.cleveland.com/news/g661-2019/03/4618af0fb93984/a-matriarchs-fight-fredericka-wagner-denies-charges-allegations-in-pike-county-mass-murder.html>



grand jury the names of the people she suspected killed the Rhodens.” “[ ] Wagner said she wonders about the accuracy of the investigation into her family, based on the errors that she said are evident in her case.” (*Id.*)

On Sunday, March 17, 2019, Defense Counsel Owen also gave a phone interview to Local 12 News. In an article published on March 17, 2019, Owen is quoted as follows:

“The alleged perjury was a figment of their imagination,” Owen said in a phone interview Sunday. “They indicted her for a crime that never happened without a time machine.”<sup>5</sup>

This article also quotes Defendant’s *Motion to Dismiss Indictment*, filed on Friday, March 15, 2019, and quotes Defendant’s grand jury testimony, as revealed in that motion.

## II. ARGUMENT

### a. Rule 3.6 of the Ohio Rules of Professional Conduct prohibits materially prejudicial communication with the media in a criminal case pending trial.

Rule 3.6 of the Ohio Rules of Professional Conduct governs trial publicity. The rule states, in relevant part:

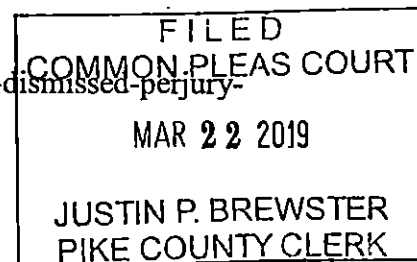
(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

Ohio Rules of Professional Conduct 3.6(a).

While attorneys and their clients retain their First Amendment rights during the pendency of a criminal trial, this is limited by Prof.Cond.R. 3.6 which “impose[s] reasonable and necessary limitations on attorneys’ extrajudicial statements. . . . Thus, while we do not muzzle an attorney representing a party in a proceeding, attorneys are not given carte blanche to defame

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<sup>5</sup><https://local12.com/news/local/wagner-family-matriarch-asks-judge-to-dismiss-perjury-obstruction-charges>.



others under the guise of litigation.” *Am. Chem. Soc. v. Leadscope, Inc.*, 133 Ohio St.3d 366, 2012-Ohio-4193, 978 N.E.2d 832, ¶ 90.

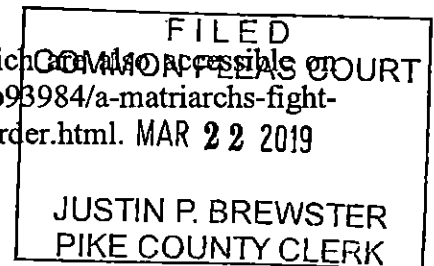
Rule 3.6(b) specifies that type of information that an attorney can communicate with the media during the pendency of a trial:

[A] lawyer may state any of the following: (1) the claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved; (2) information contained in a public record; (3) that an investigation of a matter is in progress; (4) the scheduling or result of any step in litigation; (5) a request for assistance in obtaining evidence and information necessary thereto; (6) a warning of danger concerning the behavior of a person involved when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; (7) in a criminal case, in addition to divisions (b)(1) to (6) of this rule, any of the following: (i) the identity, residence, occupation, and family status of the accused; (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person; (iii) the fact, time, and place of arrest; (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

Prof.Cond.R. 3.6(b).

Defense counsel’s statements and disclosures to the media fall under none of these exceptions, and come very close to violating Rule 3.6(a). Rule 3.6(a) bars extrajudicial statements by attorneys: (1) “that the lawyer knows or reasonably should know will be disseminated by means of public communication,” and (2) “will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.” Defense counsel’s conduct in this case arguably satisfies part one of this analysis: counsel clearly knew the information would be publicly disseminated since he sat down with his client for an interview, allowed himself and his client to be videotaped for part of that interview,<sup>6</sup> and gave an additional phone interview with a second reporter. Additionally, given the timing of when the reporter contacted the State,

<sup>6</sup> There are several videos embedded in the Plain Dealer article, which is publicly accessible on YouTube. <https://expo.cleveland.com/news/g66l-2019/03/4618af0fb93984/a-matriarchs-fight-fredericka-wagner-denies-charges-allegations-in-pike-county-mass-murder.html>.



during which he indicated that he had already sat down with the Defendant in her home, it is quite likely that he revealed the grand jury transcript and other matters which had not yet been made public, as it appears the interview took place before the Defendant's *Motion to Dismiss Indictment* was even filed with the Court.<sup>7</sup>

Defense counsel's words and actions also arguably meet the second part of this test: they have a substantial likelihood of materially prejudicing an adjudicative proceeding in this matter. The *Motion to Dismiss Indictment* itself is significant; it is filed without any legal basis (see *State's Memo Contra and Motion to Strike*), and has already been widely circulated and reported on in the press. The grand jury transcript of the Defendant, which was included in the *Motion to Dismiss Indictment*, has also been quoted in the press.

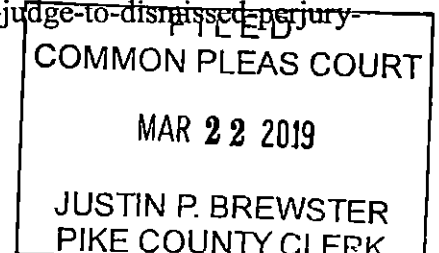
Defense Counsel also stated, in an interview to a reporter: "The alleged perjury was a figment of their imagination . . . They indicted her for a crime that never happened without a time machine."<sup>8</sup> This statement was made approximately 72 hours after Defense Counsel had turned the records over to the State, who had been consistently requesting them for eight months and had attempted to find them by subpoenaing the company the Defendant said she made the purchase through—Amazon—which turned out not to be true.

Defense Counsel also permitted his client to *directly comment* on the cases of her indicted family members, cases in which gag orders have been issued, and disparage those cases:

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<sup>7</sup> The interview could have also taken place even before Defense Counsel provided the requested records to the State.

<sup>8</sup> <https://local12.com/news/local/wagner-family-matriarch-asks-judge-to-dismiss-perjury-obstruction-charges>.





“Wagner said she wonders about the accuracy of the investigation into her family, based on the errors that she said are evident in her case.”<sup>9</sup>

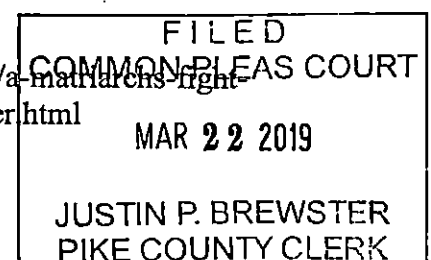
What is evident in this case is that, for the last eight months, the State has been consistently seeking the truth regarding Defendant’s purchases of body armor for her son. The State sought to work with the Defendant to obtain those records, and when her cooperation was not forthcoming, attempted to subpoena the records. The result of that subpoena revealed that the Defendant made no purchases of body armor on Amazon.

The disclosure of these purchase records on March 14, 2019, and the filing of Defendant’s meritless *Motion to Dismiss Indictment* on March 15, 2019, occurred almost simultaneously to Defendant and Defense Counsel giving two interviews to the media. In these interviews, the motion—and therefore the merits of this pending criminal case—were discussed, as well as the merits of the other cases against Defendant’s family members. The timing of these events is significant and concerning.

**b. The State requests, in light of recent events, that a gag order be issued in the instant case.**

The State previously made an oral motion requesting a gag order in this case. Based on the clear risk of the Defendant and her counsel discussing the case with the media in ways arguably prohibited by Rule 3.6, turning over sensitive documents (such as Grand Jury transcripts) to the media, and commenting on other criminal cases in which gag orders have already been issued, the State now brings this written motion to respectfully request that a gag order be issued in this case. The State requests that an order be issued prohibiting all parties, attorneys, and other potential trial participants from making statements to the media or public that have a substantial likelihood of material prejudice in this case.

<sup>9</sup> <https://expo.cleveland.com/news/g66l-2019/03/4618af0fb93984a-mattharens-fight-fredericka-wagner-denies-charges-allegations-in-pike-county-mass-murder.html>



An order of this nature is an appropriate remedy, which balances the First Amendment rights of the parties and the media. "Gag orders are considered a less restrictive alternative to restrictions imposed directly on the media." *In re T.R.*, 52 Ohio St.3d 6, 21, 556 N.E.2d 439 (1990), citing *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 564 (1976). This order should apply to counsel as well, given the facts of this case.

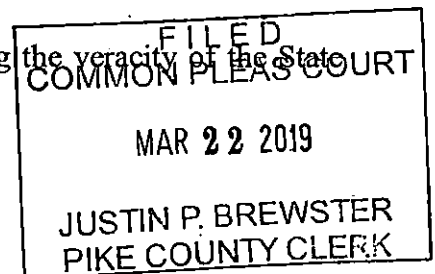
Because lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative. See, e. g., *In re Hinds*, 90 N.J. 604, 627, 449 A.2d 483, 496 (1982)(statements by attorneys of record relating to the case "are likely to be considered knowledgeable, reliable and true" because of attorneys' unique access to information); *In re Rachmiel*, 90 N.J. 646, 656, 449 A.2d 505, 511 (1982) (attorneys' role as advocates gives them "extraordinary power to undermine or destroy the efficacy of the criminal justice system").

*Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1074-75, 111 S.Ct. 2720, (1991). Additionally, the Professional Rules of Conduct apply to attorneys and thus specifically apply to Defense Counsel in this case as well.

Further, The United States Supreme Court summed up the State's concerns in *Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507, 16 L.Ed. 2d 600 (1966):

"Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused . . . [T]he cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by the rule and regulation that will protect their processes from prejudicial interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function."

*Id.* at 362-63. The State, like the accused, is entitled to a fair and impartial trial in this case that is free from outside influences. The Defendant's statements questioning the veracity of the State



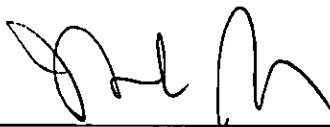
most certainly frustrate the function of this Court and the administration of justice in this matter. It is entirely proper for this Court to take steps to protect the judicial process from this type of prejudicial interference.

The fact that Defendant commented on her family members' cases, where gag orders have already been issued, highlights the extreme prejudicial interference that Defendant and her counsel have engaged in, and will continue to engage in without a gag order. The statements are improper attempts to influence the public regarding the allegations against the Defendant, along with the matters pending against her family members, in already highly publicized matters where requests have already been made to change venue due to pretrial publicity. It is improper for Defendant and her counsel to take it upon themselves to generate more publicity that will only serve to frustrate the function of this Court. The actions of the Defendant and her counsel only stand to further complicate the ability of these cases to be tried by fair and impartial jurors from Pike County.

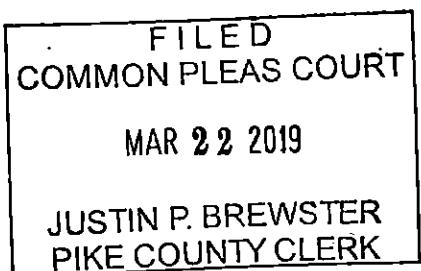
### III. CONCLUSION

For all of the foregoing reasons, the State respectfully requests that this Court issue a gag order prohibiting all parties, attorneys, and other potential trial participants, from making statements to the media or public that have a substantial likelihood of material prejudice in this case.

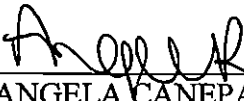
Respectfully submitted,



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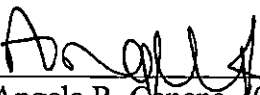


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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the above Motion for a Gag Order was emailed to James  
D. Owen, Attorney for Defendant, on March 22, 2019.

  
Angela R. Canepa (0052054)  
Special Assistant Prosecuting Attorney

